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Supreme Court, U. S.

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In The  
**Supreme Court of the United States**

October Term, 1998

AMANDA MITCHELL,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Third Circuit

**REPLY BRIEF OF PETITIONER**

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## INTRODUCTION

This Reply Brief is limited in its scope, because Respondent concedes that sentencing is part of a "criminal case," *Resp. Br.* at 13 n.4, 29, and nowhere argues that giving testimony that might cause a greatly enhanced sentence does not qualify as "self-incrimination." Respondent has decided instead to argue that Petitioner Mitchell had a right to remain silent at sentencing, but waived that right with her guilty plea.

Respondent's waiver argument attempts to sidestep the holding and principles of this Court's decision in *Estelle v. Smith*, 451 U.S. 454 (1981). Moreover, Respondent's claims rest on two insufficient foundations: distorted readings of inapposite case law; and a fundamental misconception of the nature of the Rule 11 process for entering guilty pleas. Respondent's arguments do not establish that a defendant who pleads guilty waives her Fifth Amendment rights with regard to sentencing and, *a fortiori*, do not establish that such a rule applies to the special circumstances of Petitioner's case.

## ARGUMENT

### I. A GUILTY PLEA DOES NOT OPERATE TO REQUIRE A DEFENDANT TO DISCLOSE EVERY DETAIL OF HER OFFENSE AT SENTENCING

#### A. There Is No Compelling Reason To Limit *Estelle v. Smith* To Capital Cases

The most obvious starting point for analysis in this case is *Estelle v. Smith*, 451 U.S. 454 (1981), a capital case in which this Court held that the Fifth Amendment right against self-incrimination applied to sentencing. Because of Respondent's reliance on its waiver argument, Respondent pauses to address *Estelle* only in the alternative, in a

footnote, distinguishing *Estelle* on the sole basis that capital sentencing often entails "unique procedural protections." *Resp. Br.* at 13 n.4. However, *Estelle* nowhere suggests that the constitutional protection against self-incrimination at sentencing is unique to capital cases. For this Court's purposes, the only difference between *Estelle* and this case is that *Estelle* came first.

This Court held in *Estelle* that the "essence" of the Fifth Amendment protection against self-incrimination is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Estelle*, 451 U.S. at 462 (quoting *Culombe v. Connecticut*, 367 U.S. 568, 581-82 (1961)) (emphasis added), and this Court specifically rejected the notion that "incrimination is complete once guilt has been adjudicated." *Id.* These principles are as relevant to the sentencing proceedings in this case as they are to the sentencing proceedings in a capital case; the only distinction that *Estelle* implies is one of magnitude, not kind. Put simply, the Fifth Amendment right against self-incrimination is a clear constitutional right and cannot be dismissively recharacterized as only a "procedural protection." The only questions that this Court need ask before applying it, in this case or in any other case, are: (1) whether there is a danger of self-incrimination; and (2) whether it is in the context of a criminal case. Respondent does not contest that both criteria are satisfied in this case, and thus gives this Court no basis for limiting *Estelle* to capital sentencing.

That *Estelle* did not foreclose its extension to the non-capital context is further evident from the sole case that Respondent offers on this point, *Monge v. California*, 118 S. Ct. 2246 (1998). In *Monge* this Court drew a distinction between capital and non-capital cases, but did so in a way that contrasts so starkly with the present case as to

demonstrate that it is clearly inappropriate to draw such a distinction here.

In *Monge*, this Court considered the "narrow exception" of *Bullington v. Missouri*, 451 U.S. 430 (1981), which provided that when a capital defendant is sentenced to life imprisonment in his first, flawed trial, double jeopardy considerations prevent the State from seeking the death penalty in his retrial. The *Bullington* Court acknowledged that this was different than non-capital cases, because the Double Jeopardy Clause had long been held not to protect non-capital defendants from receiving a harsher sentence upon retrial. This is because the first, lighter sentence is not an "acquittal" that generates double jeopardy protection. See *id.* at 438. In the capital context, by contrast, factors such as the jury's binary discretion and the high standard of proof applied to the evidence mean that sentencing is "like [a] trial" for the purposes of the Double Jeopardy Clause, and that a life sentence is indeed like an acquittal. *Id.* at 438-39, 446. *Bullington* thus established an expressly "unique" procedural protection. Then, in *Monge*, this Court properly refused to extend *Bullington* to non-capital cases; doing so would have meant that the narrow exception had swallowed the well-settled rule. See *Monge*, 118 S. Ct. at 2251.

In *Estelle* (decided the same month as *Bullington*), this Court took a very different approach. Unlike *Bullington*, the Court in *Estelle* was writing on a clean slate, not seeking to carve out an exception to a venerable rule. Unlike *Bullington*, whose very basis was the distinction between capital and non-capital sentencing, *Estelle* rested on general sentencing principles. Unlike *Bullington*, which labored to analogize life sentences in capital cases to "acquittals" for double jeopardy purposes, *Estelle* needed no analogies to fit sentencing under the rubric of the "criminal case" referenced in the Self-Incrimination

Clause.<sup>1</sup> Capital sentencing fits *a fortiori*. In sum, when the *Monge* Court limited *Bullington* to the capital context, it recognized the limited nature of *Bullington*'s holding given the plain language of the Double Jeopardy Clause. If this Court were to limit *Estelle* similarly in this case, it would be completely rewriting *Estelle* while ignoring the even plainer language of the Self-Incrimination Clause.

**B. Respondent's "Waiver" Cases All Deal Either With Grand Jury Proceedings Or With Cross-Examination At Trial, And Cannot Be Extended To Sentencing**

Respondent's waiver argument – that a defendant who pleads guilty to offenses “waive[s] the right to remain silent about the details of those offenses” at sentencing, *Resp. Br.* at 13 – is spun from a series of inapplicable cases. Not only do Respondent's cited authorities have nothing to do with guilty pleas or sentencing, they are not even remotely analogous to this case.

Respondent begins with a tautology, pointing out that a guilty plea inherently acts as a waiver of the right against self-incrimination. *Resp. Br.* at 14. This is obvious, since a guilty plea is, by definition, an act of self-incrimination with regard to the elements of the offense charged. Once the criminal case has been completely resolved, furthermore, double jeopardy principles dictate that the defendant no longer faces incrimination with regard to that offense, and the defendant thus has no basis for

<sup>1</sup> As the *Estelle* Court put it, “the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites.” *Estelle*, 451 U.S. at 462 (quoting *In re Gault*, 387 U.S. 1, 49 (1967) (alteration in *Estelle*)). Respondent concedes that a statement by Petitioner would have invited exposure sufficient to implicate the Fifth Amendment. *Resp. Br.* at 13 n.4, 29.

refusing in another case to testify fully about the offense. Where there is still a *potential* for self-incrimination, by contrast, the right not to testify remains unscathed by the guilty plea. See *Resp. Br.* at 14 (citing cases that center on this distinction, but miscasting the cases as establishing a broader waiver principle).

Respondent then moves to the crux of its argument – that a guilty-pleading defendant “waives his Fifth Amendment privilege . . . as to all details of the offense, including those details that could affect the severity of his sentence.” *Resp. Br.* at 15. This principle, we are told, is “well established in Fifth Amendment law.” *Id.* However, this “well established” grounding consists of cases dealing with grand jury testimony, or with the scope of cross-examination of a witness who has chosen to testify at trial, but no cases that concern guilty pleas or sentencing.

Respondent's first case is *Rogers v. United States*, 340 U.S. 367 (1951), which Respondent says “stands for the general principle that ‘[d]isclosure of a fact waives the privilege as to details.’ ” *Resp. Br.* at 15 (quoting *Rogers*, 340 U.S. at 373). But this “general principle” is highly qualified by the language immediately preceding the phrase that Respondent quotes: “petitioner cannot invoke the privilege where response to the specific question in issue here would not further incriminate her.” *Rogers*, 340 U.S. at 373. Thus, Respondent's citation obscures the true holding of *Rogers*, which concerned a *grand jury* witness who had already completely incriminated herself, but refused to testify regarding *another* person's activities. Since there was no possibility of further self-incrimination, there was no basis for the witness in *Rogers* to refuse to make a complete disclosure to the grand jury. It is *this* rather basic proposition for which *Rogers* stands, and nothing more.

Respondent further relies on *United States v. St. Pierre*, 132 F.2d 837 (2d Cir. 1942), another case that Respondent would have this Court believe applies to

sentencing and requires Petitioner to provide extensively detailed and broadly incriminatory testimony. In *St. Pierre*, however, the issue once again was testimony before a grand jury, where a defendant (who was already fully incriminated) refused to name his accomplice. *Id.* at 840. There was obviously no Fifth Amendment privilege left for the defendant, for the same reason as in *Rogers*: there simply was no possibility of further self-incrimination.

Faced with the inapplicability of these precedents, Respondent chooses simply to ignore the distinction between grand jury proceedings and trial and sentencing. Grand jury proceedings are inquisitorial, not adversarial. Grand jury witnesses, even putative defendants, are not entitled to have counsel present in the grand jury room, to challenge the witnesses against them, or indeed to put on a "defense" of any sort. They can either answer questions or, when applicable, plead the Fifth Amendment. It is hard to see, therefore, how *Rogers* and *St. Pierre*, which hold that grand jury witnesses with no possibility of further self-incrimination must testify completely, stand for the proposition that Petitioner must submit to similarly unlimited interrogation in a high-stakes adversarial sentencing proceeding.

The remainder of Respondent's cited authority deals with cross-examination of a witness who has chosen to take the stand at trial. It is indeed well-settled that a defendant who elects to testify cannot refuse to submit to cross-examination intended to probe that testimony. See *Ohio Adult Parole Auth. v. Woodard*, 118 S. Ct. 1244, 1252-53 (1998). Any other conclusion would be inconsistent with the adversarial system of fact-finding. But this tells us nothing about sentencing, or about defendants such as Petitioner who have not testified. As Respondent notes, this Court said in *Brown v. United States*, 356 U.S. 148, 155-56 (1958), that a defendant "cannot reasonably claim that the Fifth Amendment gives him . . . an immunity

from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell." See *Resp. Br.* at 17-18. The concern, Respondent admits, is with witnesses who want to "present a one-sided account to the trier of fact." *Id.* at 17.

Respondent is far from the mark in claiming that such a concern arises in the sentencing context presented by this case. The prosecution, armed with facts adduced at another, related trial, was not in any way "ham-strung" or precluded from presenting its view of the pertinent facts. Petitioner, who had merely affirmed those agreed-upon facts proffered *jointly* at the plea hearing, offered no testimony that could have been the proper subject of cross-examination. Accordingly, Petitioner has chosen simply to put the prosecution to its proof without her assistance, the *precise* choice that the Fifth Amendment is designed to allow her to make.

### C. The "Single Proceeding" Rule Does Not Apply

Respondent offers up another ambitious reinterpretation of criminal jurisprudence when it suggests that, because a waiver of Fifth Amendment rights is limited to the proceeding in which it is made, a guilty plea necessarily waives Fifth Amendment rights at sentencing. See *Resp. Br.* at 28-31.

As Respondent correctly notes, this "single proceeding" rule is designed "to protect a witness against changed circumstances – such as a change in the law or in the focus of inquiry." *Resp. Br.* at 28; see, e.g., *United States v. Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979) (waiver in grand jury proceedings does not extend to resultant trial), *cert. denied*, 446 U.S. 935 (1980); *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972) (waiver in witness's trial does not extend to co-conspirator's trial), *cert. denied*, 409

U.S. 1128 (1973). As Respondent also notes, the rule has been applied widely to allow a guilty-pleading defendant awaiting sentencing to decline to testify in a co-defendant's trial. See *Resp. Br.* at 30 (citing five such cases).

Respondent's argument is an illogical inversion of the single proceeding rule, in two ways. First, the rule is a shield for witnesses that limits the scope of their waiver; Respondent would convert the rule into a sword that expands the waiver. Second, there is no logical connection between restricting a waiver to certain boundaries, and applying the waiver anywhere and everywhere within those boundaries. That is, just because an impermeable border surrounds a "proceeding," preventing the application of a waiver in another proceeding, this does not necessarily mean that there are not other such borders *within* the first proceeding, restricting the waiver to only certain aspects of it. Just as other proceedings may represent changes in law or focus, so too does sentencing represent such a change *within* a proceeding.

Indeed, because of these changes in law and focus at sentencing, this Court need not even conclude that a plea hearing and a trial are the same "proceeding" for purposes of the rule. Plea hearings and sentencing are directed toward different ends (finding a factual basis adequate to tie the defendant to the indictment, versus developing a complete picture of the offender to determine his actual fate), use different standards of proof (minimal support versus a preponderance of the evidence) and use different methods of inquiry (inquisitorial versus adversarial proceedings).<sup>2</sup> In this case, the change in focus could not be starker – total drug quantity was

<sup>2</sup> All of this is another way of looking at the point stressed above that the Fifth Amendment privilege requires the possibility of incrimination; if the change in focus or law means that the specter of incrimination reappears, the Fifth Amendment right reappears as well.

irrelevant at the plea hearing (which is why it was not covered there), but was a central theme of sentencing, with an extended term of imprisonment for Petitioner riding on the outcome. In short, the law and focus of a plea hearing is quite clearly changed in sentencing, and so the two are separate "proceedings."

Furthermore, while Respondent focuses only on sentencing proceedings in open court, just as important in the sentencing process is the preparation of the presentence report by the probation officer who interviews the defendant (among others). Respondent ignores this issue, but Respondent's position would strip defendants of Fifth Amendment protection in this obviously "separate proceeding," and would turn the probation officer – the only non-constitutional officer in the sentencing process – into an inquisitor of unprecedented power.

Based on all of these things, it is not surprising that Respondent can find no case in which the "single proceeding" rule is inverted and used to narrow rather than expand the scope of the Fifth Amendment right. This case surely should not become the first.

## II. RESPONDENT'S VIEW OF THE RULE 11 PROCESS IS MISGUIDED AND UNPRECEDENTED

### A. Respondent Overstates The Extent Of The Judicial Inquiry Mandated By Rule 11

Respondent is correct that Rule 11(f) requires courts to assemble a factual basis that is adequate to support a guilty plea. See *Resp. Br.* at 22. Respondent is also correct that Rule 11(c)(5) foresees the possibility of the court questioning the defendant under oath about the offense. See *id.* However, nothing in either the cases cited, the text of Rule 11, or common practice supports Respondent's view that a searching and "intense inquiry" of all the details of the defendant's conduct, including facts relevant only to sentencing and not the elements of the

offense, must be part of the determination under Rule 11(f). Respondent's view of the Rule 11 process is bizarre to say the least, and Respondent's implication that Rule 11 standards intended to *protect* the rights of defendants are actually the basis for *destroying* the rights of those defendants is truly breathtaking.

As Respondent notes, Rule 11(f) requires the court to conduct an inquiry to satisfy itself that a factual basis exists to support the guilty plea. See *Resp. Br.* at 22-23. The purpose of this inquiry is self-evident – to make sure that the defendant has actually done what the state says he has done, and what he is pleading guilty to doing. It is obviously inconsistent with basic principles of due process for a court to accept a guilty plea when there is no basis to conclude that the defendant committed the offense charged. Thus, the Rule 11 inquiry is intended to *protect* the defendant from being "railroaded." See *United States v. Washington*, 969 F.2d 1073, 1077 (D.C. Cir. 1992) (factual basis requirement intended to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge") (quoting FED. R. CRIM. P. 11 advisory committee's note (1966 Amendment)).

Respondent lists several purposes underlying the court's questioning of a defendant, *viz.*, making sure that the defendant understands possible defenses, removing confusion, making sure that the defendant really does want to plead guilty, and so on. See *Resp. Br.* at 23-25. These examples further demonstrate that the purpose of the inquiry is to protect the defendant, not to further investigate the offense, and certainly not to exact a total waiver of defendant's constitutional protections in the ongoing criminal process. As with the single proceeding rule, Respondent attempts to turn a constitutional shield into a prosecutorial sword.

The quantum of evidence necessary to constitute a factual basis has been held to be quite low. See *United States v. Tunning*, 69 F.3d 107, 114 (6th Cir. 1995) (preponderance of the evidence not required); *United States v. Alber*, 56 F.3d 1106, 1110 (9th Cir. 1995) (same). Not only is the Rule 11 proceeding not a searching inquiry, it need not even be an inquiry of the defendant; a district court is permitted to assemble the factual basis by securing facts from a number of sources other than the defendant. See, e.g., *United States v. Graves*, 106 F.3d 342, 345 (10th Cir. 1997) (court may obtain factual basis from presentence report); *Tunning*, 69 F.3d at 112 (court may obtain factual basis from prosecutor's statement); see also *United States v. Baez*, 87 F.3d 805, 809 (6th Cir. 1996) (defendant's one word agreement to factual basis set forth in plea agreement suffices), *cert. denied*, 117 S. Ct. 405 (1996); *United States v. Trott*, 779 F.2d 912, 914 (3d Cir. 1985) (defendant not required to confirm every allegation in indictment). Indeed, nothing in Rule 11 prohibits a court from accepting a plea of guilty in spite of a defendant's protestations of innocence. *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970).<sup>3</sup>

These examples belie Respondent's characterization of a guilty plea as "testimony." This so-called "testimony" is typically just perfunctory affirmance of the facts as recited by the *prosecution*, not the detailed, heart-pouring confession portrayed by Respondent. Cf. *United States v. McCarthy*, 394 U.S. 459, 466 (1969) (defining guilty plea as "admission of all the elements of a formal criminal charge"). A guilty plea is not "testimony," and it does not represent an obligation, either at the plea hearing or at sentencing, to testify without limit regarding the details

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<sup>3</sup> Alternately, the district court can simply decline to accept the plea. See *Alford*, 400 U.S. at 38 n.11.

of the offense.<sup>4</sup> The goal of Rule 11(f) is to make certain that some evidence exists as to the elements of the crime, nothing more. There is thus no foundation in law or policy to extend Rule 11 procedures to include inquiries into drug quantities that are not elements of the offense, but rather matters left for sentencing. It makes no sense to hold that a guilty plea opens the door to a no-holds-barred inquisition at sentencing.

Respondent offers no precedential basis for its position. The best that Respondent can do is offer the rhetorical point that:

If the court can require the defendant who pleads guilty to reveal the details of the crime without violating any Fifth Amendment privilege – as a reasonable application of Rule 11 requires – it would make little sense to permit the defendant to rely on the Fifth Amendment at sentencing to withhold the same details.

*Resp. Br.* at 27. The three misstatements in this passage sum up why Respondent's waiver argument must fail. First, as shown by *Alford*, there is no requirement that the

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<sup>4</sup> Nor is it meaningful for Respondent to analogize a plea to a "confession." See *Resp. Br.* at 9, 14. For one thing, *Boykin v. Alabama*, 395 U.S. 238, 242 (1969), from which Respondent's strategically abridged quotation is drawn, equated guilty pleas with confessions in the sense of being an act of admission, not in the sense of being fact-intensive personal statements. At any rate, the quoted passage in *Boykin* dealt with methods of determining the voluntariness of guilty pleas, not with their confessional nature.

Furthermore, though a defendant whose confession has been introduced into evidence may have compelling strategic reasons to take the stand and testify, there is no authority for the position, parallel to Respondent's, that the earlier confession requires the defendant to take the stand and incriminate himself further by filling in all missing details in which the prosecution is interested. See *Harrison v. United States*, 392 U.S. 219 (1968).

defendant reveal anything in a Rule 11 proceeding. Second, the Rule 11 inquiry is not concerned with the "details" of the crime, but rather with a skeletal factual basis sufficient to protect the defendant's rights. Third, Petitioner nowhere argues that the facts she admitted in the Rule 11 hearing cannot be used at sentencing. That is, "the same details" (such as they are) that emerged from the plea hearing are fair game in sentencing. Rather, Petitioner wishes to remain silent about unnecessary (from a Rule 11 standpoint) and unlimited *additional* details that were absent (indeed, expressly reserved) from the Rule 11 proceeding.<sup>5</sup>

Respondent's version of Rule 11 looks nothing like the process currently practiced in federal district courts, and this Court should not accept Respondent's invitation to rewrite Rule 11 procedure to make it so.

#### **B. The Bounds Of The Waiver Rule Proposed By Respondent Are Untenable**

It is when Respondent attempts to define the limits of its theory of Fifth Amendment waiver that its assertions are revealed most starkly as radical and untenable.

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<sup>5</sup> In contrast to Respondent's usual reluctance to cite authority that relates to sentencing, Respondent notes USSG § 3E1.1, which requires a defendant to provide a more expansive disclosure at sentencing of the offense conduct. See *Resp. Br.* at 20. Of course, § 3E1.1 governs downward adjustments for "acceptance of responsibility," which is not at issue in this case. The fact that Respondent believes that every defendant who enters a guilty plea is required to be as forthcoming as those defendants who are being treated more leniently for their openness highlights the absurdity of Respondent's theory. Respondent's argument also ignores that such an adjustment may be obtained through a plea pursuant to FED. R. CRIM. P. 11(e)(1)(C) and (e)(3), which specifies a particular offense level and either includes or does not include defendant's description of the offense conduct.

Noting the weight of case law that says that a guilty-pleading defendant awaiting sentencing can invoke the Fifth Amendment in a co-defendant's trial, Respondent argues that it is acceptable to allow such an invocation while forbidding it in the guilty pleader's own sentencing. See *Resp. Br.* at 30-31. However, the testimony is the same, and either the defendant is incriminating himself or he is not. There is no basis for Respondent's distinction.

Respondent then turns and stretches the bounds of its ill-considered new rule beyond all reasonable compass. Respondent contends that a defendant must give all relevant information "reasonably related" to his offense, even if that information relates to other crimes to which he has not pleaded guilty. See *Resp. Br.* at 18. Respondent takes the quoted phrase from *McGautha v. California*, 402 U.S. 183, 215 (1971), where this Court held that a defendant who chooses to testify must answer any questions on cross-examination that are reasonably related to the direct testimony. Thus, Respondent takes a cross-examination rule, designed to balance considerations of relevance with the demands of the adversary process, and turns it on its head in an unrelated context. In doing so, Respondent would allow the prosecution free rein to expand on *uncontested* testimony (indeed not even testimony, since it is generally just the defendant's affirmance of the facts as the *prosecution itself* has presented them), even if that expansion results in the defendant incriminating himself in several other, tangentially related crimes.<sup>6</sup>

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<sup>6</sup> Respondent argues that Petitioner failed to articulate this as a basis for invoking the Fifth Amendment and therefore waived the "other crimes" rationale for seeking protection of the Fifth Amendment. There is no such waiver here. Petitioner simply invoked the Fifth Amendment in its entirety and did not limit it to any specific bases. The district court did not inquire as

Respondent apparently notices that no reasonable defendant would (or has) chosen such a path, and offers in reply the unpersuasive assertion that, if a defendant is not willing to divulge all of the details of his crime (including those that might implicate him in other crimes) he can simply not plead guilty and instead go to trial. *Resp. Br.* at 19. Apparently, Respondent finds untenable a third path – in between divulging every single detail related to one's conduct on the one hand, and denying responsibility on the other – of admitting to the offense as charged but exercising one's right to an adversarial sentencing proceeding. Respondent thus changes sentencing from an adversarial to an inquisitorial system, and refuses to accept the true nature of the guilty plea in our system.

Respondent's inability to draw sensible limits on its proposal for the deprivation of Fifth Amendment rights shows that its view of Rule 11 and sentencing is not tenable, and that Petitioner must prevail.

### III. REGARDLESS OF WHETHER A GUILTY PLEA CAN SERVE TO WAIVE THE RIGHT AGAINST SELF-INCRIMINATION, THERE WAS NO WAIVER IN THIS CASE

Given the shaky foundations on which Respondent's waiver argument is built, it is not surprising that Respondent largely ignores three factual elements that weaken the logical basis for a finding of waiver in this particular case. That is, even if this Court were to rewrite *Estelle* and

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to defendant's specific reasons for invoking the Fifth Amendment, taking it for granted that an ample basis existed, and focusing instead on the waiver question. This Court has long been loathe to find waiver by implication once the protections of the Fifth Amendment are sought. See, e.g., *Emspak v. United States*, 349 U.S. 190, 195-98 (1955); *Smith v. United States*, 337 U.S. 137, 150-51 (1949).

accept Respondent's waiver argument as a general matter, there would still be compelling due process reasons to find that there was no waiver by Petitioner in this case.

The first factor that Respondent attempts to finesse is Petitioner's specific reservation in her guilty plea (J.A. 38-39). When entering her guilty plea, Petitioner explicitly reserved the right to contest the quantity of drugs attributed to her. This did not prevent her from pleading guilty to the offense charged; it is uncontested that a quantity of drugs was involved, and the sole question, unrelated to any element of the offense, was how much.

Petitioner's reservation on the quantity issue was strikingly specific, and such reservations are hardly uncommon in the annals of criminal law. Cf. FED. R. CRIM. P. 11(a)(2) (allowing conditional guilty pleas, reserving right to appeal particular issues). The district court understood and readily accepted Petitioner's reservation, and the reservation underscores the adversarial nature of the sentencing fact-finding process. Given how typical these proceedings were, it is quite striking that Respondent believes that Petitioner's guilty plea converted the sentencing hearing into an inquisitorial process, in which Petitioner suddenly bore the responsibility of answering to the court and accounting for all of the drugs incidentally involved in her criminal conduct. Petitioner no doubt would have been quite surprised to be told that her reservation was such a spectacular exercise in futility. So too, no doubt, would the countless defendants every day who plead guilty but contest their sentences, or who reserve a particular issue to contest on appeal.

— Respondent believes otherwise, arguing that "[a] defendant who wishes to confess to the crime and permit the court to enter judgment on the plea cannot control the scope of his waiver any more than a witness who elects to testify can dictate the scope of his cross-examination."

*Resp. Br.* at 34.<sup>7</sup> Not only does Respondent's belief ignore the widespread practice of conditional pleas and reservations of sentencing issues, it also ignores this Court's recognition of a defendant's ability to plead guilty while admitting nothing and putting the prosecution to its proof. See *Alford*, 400 U.S. at 38 (accepting guilty plea "[i]n view of the strong factual basis for the plea demonstrated by the State and [defendant's] clearly expressed desire to enter it despite his professed belief in his innocence"). Furthermore, it does not fit with this Court's recognition of a defendant's ability to concede guilt on one element of an offense, and foreclose the prosecution's attempt to introduce duplicative and prejudicial evidence. See *Old Chief v. United States*, 117 S. Ct. 644, 647 (1997). In all of these contexts, defendants exercise significant control over the extent to which they waive their rights.

Respondent concludes with the feeble rejoinder that, while Petitioner's reservation may have served to put the prosecution to its proof, it did not prevent her silence from being held against her. See *Resp. Br.* at 34. This untenable distinction reveals Respondent's misunderstanding of the Fifth Amendment. If a defendant's silence is held against her, she is forced (choosing the third part of the cruel trilemma of contempt, perjury, and self-incrimination) to be a witness against herself. And if she is forced to be a witness against herself, the prosecution is not put to its proof. To quote again from *Estelle*, the "essence" of the Fifth Amendment protection against self-incrimination is "the requirement that the State . . . produce the evidence . . . by the independent labor of its officers, not by the simple, cruel expedient of forcing it

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<sup>7</sup> Respondent here continues its baffling persistence in analogizing the act of pleading guilty to "testimony," an issue discussed above.

from [the defendant's] own lips." *Estelle*, 451 U.S. at 462 (quotation marks omitted). To accept Respondent's rejoinder would not only force incriminating evidence from Petitioner's own lips, but would do so after tricking her into believing that she had reserved the right to contest her sentence. This is the sort of "gamesmanship" that this Court properly disdains in the context of guilty pleas. See *Resp. Br.* at 27-28; see also *United States v. Hyde*, 117 S. Ct. 1630, 1634 (1997) (decrying view of Rule 11 process that would "degrade the otherwise serious act of pleading guilty into something akin to a move in a game of chess").

The trickery would not end with the acceptance of the reservation. When the district court read Petitioner the litany of rights that she *was* waiving, included in the list was the right to remain silent "at trial" (J.A. 45). The district court explicitly stated that some of the rights being waived were "pre-trial" rights, while others were "trial" rights (J.A. 43-45). That no post-trial rights are mentioned sent a clear message that no post-trial rights were waived.

Respondent's answer on this issue is to quote *Libretti v. United States*, 516 U.S. 29, 50-51 (1995), where this Court held that, with the exception of those rights Rule 11 specifically requires the court to discuss with the defendant, it is counsel's responsibility to apprise a defendant of his rights. *Resp. Br.* at 33. But it cannot have been the responsibility of counsel to have apprised Petitioner that she had waived her right to remain silent at sentencing, because (as the Third Circuit itself noted) before the appellate decision in this case, the circuits were unanimous that defendants like Petitioner did *not* waive their Fifth Amendment rights (J.A. 122-23).

*Libretti* more directly frowns upon the third aspect unique to this case – the explicit statement by the district court at sentencing that Petitioner did not have to testify. If Petitioner had any notion that she might have waived

her Fifth Amendment rights for sentencing purposes, that notion would have been dispelled when the following exchange took place:

THE COURT: Mr. Morley, so you have any other witnesses you wish to call?

MR. MORLEY: No, Judge.

THE COURT: Are you – your client should – especially in a factual context like this, your client – she may testify if she wishes, but she may remain silent.

(J.A. 79). As *Libretti* held in an analogous situation, "a district judge must not mislead a defendant regarding the procedures to be followed . . . , nor should the court permit a defendant's obvious confusion about those procedures to stand uncorrected." *Libretti*, 516 U.S. at 51. In this case, Petitioner was led to believe that she had the right to decline to testify, when her reservation was accepted, when her right to remain silent *at trial* only was waived, and when the district court told her she could remain silent at sentencing. Only when it was too late did the district court announce that the right did not exist after all (J.A. 93).

Based on these three factors, even if this Court somehow concludes that a guilty plea acts as a Fifth Amendment waiver through sentencing, this Court cannot conclude that such rights were waived knowingly, voluntarily, or intelligently in this case.

## CONCLUSION

Respondent's arguments, if accepted by this Court, would radically restructure the current practice of accepting guilty pleas in the federal district courts. In abrogating a right plainly established by this Court in *Estelle*, Respondent would vastly increase the risk to defendants in pleading guilty, give to the court and probation officers new and untested inquisitorial powers, and dissuade

defendants from entering pleas based upon a reservation of issues for sentencing. This Court's principles and jurisprudence require no such result, and this Court should reverse and remand for resentencing.

Respectfully submitted,

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